(4)

No. 09-1254

Supreme Court, U.S.
FILED
MAY 17 2010
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

MAREI VON SAHER,

Petitioner,

v.

NORTON SIMON MUSEUM OF ART AT PASADENA and NORTON SIMON ART FOUNDATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* COMMISSION FOR ART RECOVERY IN SUPPORT OF PETITIONER

MICHAEL A. LACHER
LACHER & LOVELL-TAYLOR
460 Park Avenue
New York, NY 10022
(212) 872-1500
mlacher@lltlaw.com

Attorneys for Amicus Curiae

TABLE OF CONTENTS

Page

TABLE OF CITED AUTHORITIES ii

INTEREST OF *AMICUS CURIAE*..... 1

SUMMARY OF ARGUMENT 5

ARGUMENT..... 6

I. States Have A Recognized Interest In Setting Their Own Statutes of Limitation For Various Claims, and § 354.3 Is No Different 6

II. The *von Saher* Ruling Will Have A Devastating Impact On Thousands Of Individuals..... 8

III. The Policy of the Federal Government Is That Holocaust Restitution Claims Should Be Resolved On The Merits, and § 354.3 Is Consistent With That Policy..... 11

IV. Technical Defenses Like Statutes of Limitations Should Not Be Used To Prevent Recovery Of Nazi- Looted Art 14

CONCLUSION..... 24

Page

TABLE OF CITED AUTHORITIES

FEDERAL CASES

American Ins. Ass'n. v. Garamendi, 539 U.S. 396 (2003) 7, 24

Detroit Institute of Arts v. Ullin,
No. 06-10333,
Memorandum Opinion and Order of Hon. Denise Page Hood, Dkt. 36
(E.D. Mich. S. Div. Mar. 31, 2007)..... 20

Erie R.R. Co. v. Tompkins,
304 U.S. 64 (1938)..... 6

The Museum of Fine Arts, Boston v. Seger-Thomschitz,
Civ. Action No. 08-10097-RWZ,
Memorandum of Decision and Order of Hon. Rya W. Zobel, Dkt. 59 (D. Mass. May 28, 2009)..... 23

Schoeps v. Museum of Modern Art,
594 F. Supp.2d 461 (S.D.N.Y. 2009..... 22-23

Toledo Museum of Art,
477 F. Supp.2d 802
(N.D. Ohio 2006)..... 20

Page

von Saher v. Norton Simon Museum of Art, 592 F3d 954, 966 (9th Cir. 2010)) 4, 7, 13

STATE STATUTES

Cal. Code Civ. Proc. § 354.3 ..... *passim*

MISCELLANEOUS

American Association of Museums, List of Accredited Museums, http://www.aam-us.org/museumresources/accred/list.cfm; 18

Commission for Art Recovery, Cases and Experience,http://www.commartrecovery.org/cases.php. 2

Commission for Art Recovery, Mission Statement, http://www.commartrecovery.org/mission.php..... 14

Ambassador J.D. Bindenagel, *Washington Principles on Nazi-confiscated Art: Ten Years and Promises of the Washington Principles*, Holocaust Era Assets Conference Prague and Terezin, Czech Republic (June 26-30, 2009) http://www.commartrecovery.org/docs/bindenagel.pdf.....15, 18

Page

Stuart E. Eizenstat, Head of U.S. Delegation to the Prague Holocaust Era Assets Conferences, *Opening Plenary Session Remarks at Prague Holocaust Era Assets Conference*, Prague Conference on Holocaust-Era Assets, Czech Republic (June 28, 2009), http://www.state.gov/p/eur/rls/rm/2009/126158.htm..... *passim*

Wesley A.. Fisher, Letter to Ford W. Bell (Oct. 20, 2009), ... 21

Guidelines Concerning the Unlawful Appropriation of Objects During the Nazi Era (Approved Nov. 1999, Amended April 2001), http://www.aamus.org/museaumresources/ethics/naziguidelines.cfm... 17

J. Christian Kennedy, Special Envoy for Holocaust Issues, *The Role of the United States in Art Restitution*, Remarks at the Conference in Potsdam, Germany (April 23, 2007), http://germany.usembassy.gov/kennedy_speech.html..... ..... 10-12, 18-19

Nazi-Era Provenance Internet Portal www.Nepip.org; NEPIP Participating Museums, http://www.nepip.org/public/search/museumsearch.cfm?action=mussearch&menu_type=search..... 18-19

Page

Lindsay Pollock and Philip Boroff, *Judge Slams MoMA, Guggenheim on Secret Holocaust Art Agreement*, June 18, 2009, http://preview.bloomberg.com/apps/new?pid=newsarchive_en10&sid=ayZK6G30lMfU 23

Report of the AAMD Task Force on the Spoliation of Art during the Nazi/World War II Era (1933 – 1945) (June 4, 1998, Amended Apr. 30, 2001), http://www.amd.org/papers/guideln.php 17

Keren Blankfeld Schultz, For Many Holocaust Survivors, a Final Struggle, Columbia News Service Oct. 30, 2007, http://jscms.jrn.Columbia.edu/cns/2007-10-30/schultz-perpetualsurvivors.html..... 8

Terezin Declaration on Holocaust Era Assets and Related Issues (June 30, 2009), http://www.state.gov/p/eur/rls/or/126162.htm..... ..... *passim*

Washington Conference Principles on Nazi-Confiscated Art (Dec. 3, 1998), http://www.state.gov/p/eur/rt/hlcst/122038.htm..... 14-15

INTEREST OF *AMICUS CURIAE*

The vortex of victimization of claimants seeking to recover property lost or stolen during the Holocaust continues. The Ninth Circuit Court of Appeals has closed a final window of opportunity. Making an unwarranted connection between pursuit of converted property under state law and the power of the federal government concerning foreign policy, the court has extinguished a realistic and practical approach to resolve questions of title to property acquired through atrocity.

Precisely because there are uniquely incalculable impediments to discovery – witnesses who are dead; documentation that is lost, hidden or destroyed; and locations that are often unknown – Nazi-looted property, which has been located after an odyssey of horror, deserves recognition with an extended statute of limitations. To do otherwise dishonors not only property rights, but also fundamental fairness and decency.

The Commission for Art Recovery ("CAR") is dedicated to supporting the search for lost artworks and restitution to rightful owners.[1] That arduous

---

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or its counsel, made a monetary contribution intended to fund its

process, given the length of time, the need to identify victims, places, supporting documentation for authentication of provenance and often, the art itself, including lost family histories of title and possession, gives special urgency to the availability of California's extended statute of limitations for Holocaust-era artwork.

Hitler's Nazi regime looted approximately twenty percent of Western art during World War II. *See* Commission for Art Recovery, Cases and Experience, http://www.commartrecovery.org/cases.php. Even now, sixty-plus years after the fall of the Third Reich, a huge amount of these items remain missing, displaced, or destroyed. *Id.* Indeed, "[e]xperts have estimated that as many as 600,000 paintings were stolen, of which more than 100,000 are still missing. When furniture, china, rare books, coins, and items of the decorative arts are included, the numbers swell into the millions." Stuart E. Eizenstat, Head of U.S. Delegation to the Prague Holocaust Era Assets Conferences, *Opening Plenary Session Remarks at Prague Holocaust Era Assets Conference*, Prague Conference on Holocaust-Era Assets, Czech Republic (June 28, 2009) http://www.state.gov/p/eur/rls/rm/2009/126158.htm.

---

preparation or submission. The parties have been given appropriate notice of *amicus curie*'s intention to file and have consented to the filing of this brief. Such consents are being lodged herewith.

CAR is a non-profit organization dedicated to promoting restitution efforts for artworks that were seized, confiscated, or wrongfully taken as a result of the Holocaust and Nazi policies. CAR works with governments, museums, and various institutions to research, identify, and publicize works in their collections which may have tainted ties to the Nazi era. CAR's efforts take the form of researching, monitoring, and supporting policy and legislative change where needed. CAR also works directly with claimants to assist in recovery of looted art.

Significantly, CAR encourages streamlined procedures for returning any such objects to their rightful owners. Many collections were amassed over several generations, and their rightful owners are denied an important connection to their past if governments and museums use legal technicalities to retain art contaminated by wrongful acquisition.

As part of its work, CAR lobbies in Europe to convince governments to improve their claims procedures and other regulations, thereby fostering a favorable environment for Holocaust victims and their heirs to bring restitution claims. CAR intends to expand this effort to the United States by petitioning individual States to adjust their statutes of limitations, allowing for claimants to obtain decisions based upon the merits of each case.

CAR's interest in this case stems from its concern that the Ninth Circuit decision holding Cal. Code Civ. Proc. § 354.3 unconstitutional will have far-reaching effects beyond the State of California. As noted above, CAR intends to lobby at the state level to have statutes of limitations extended for claimants seeking restitution of art looted by Nazis or taken during World War II. The Ninth Circuit's decision in *von Saher v. Norton Simon Museum of Art*, 592 F.3d 954 (9th Cir. 2010), however, serves to encourage museums and others possessing objects with a Nazi past to continue using technical defenses. Specifically, CAR fears this ruling will dissuade other states from passing similar legislation extending their own statutes of limitations for Holocaust-era claims out of fear that they, too, will be deemed unconstitutional.

The inability or reluctance of other states to pass similar legislation will impact, negatively, the ongoing battle to return Holocaust-era artwork and cultural items to their rightful owners. Holocaust victims and their heirs will be harmed, cruelly, irreparably, and unnecessarily. The majority will be left without recourse to resolve their meritorious claims, as traditional statutes of limitations, on the whole, do not adequately protect them given the special factors involved in investigating and addressing Holocaust-era claims.

SUMMARY OF ARGUMENT

CAR urges the Court to grant *certiorari* in this case because the constitutionality issue as decided by the Ninth Circuit likely will deny justice to a large class of Holocaust claimants whose families have been victimized and cheated through no fault of their own. California has the right, as does every state, to set its own statute of limitations for conversion claims, and may exercise this right to provide Holocaust victims and their families with an extended limitations period.

Such legislation is within an area of traditional State competence, and does not infringe on the Federal government's war powers generally, nor does it conflict with any specific federal program or policy. In fact, the Ninth Circuit's decision is counterintuitive. In its effort to avoid the appearance of a State policy intruding on an area dedicated to the Federal government, the Ninth Circuit overlooked a, if not the, key factor: California's desire to provide an extended statute of limitations for victims of Nazi-era looting aligns perfectly with the Federal government's stated policy that such claims should be resolved on their merits.

The Federal government has expressed that policy domestically and abroad. However, despite both the Federal government's established preference for merit-based resolution of these claims and the

guidelines for the conduct of Museums and Museum Directors set forth by The American Association of Museums ("AAM") and the Association of Art Museum Directors ("AAMD"), many U.S. museums continue to litigate Holocaust restitution claims by relying on technical defenses.

In the absence of specific Federal legislation addressing the issue, laws similar to California's § 354.3 that are passed by individual states to extend their statutes of limitations for Holocaust-related claims are the only way to ensure just and meritorious resolution of those cases.

ARGUMENT

I. States Have A Recognized Interest In Setting Their Own Statutes of Limitations For Various Claims, and § 354.3 Is No Different

The establishment of a statute of limitations for conversion of property is a traditional state function. States have a recognized interest in setting their own statutes of limitations for various claims and regulating property over which they have jurisdiction. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). Section 354.3, which merely applies a state-specific statute of limitations concerning regulation of property to resident and non-resident parties that are otherwise subject to jurisdiction within the state, is wholly consistent

with the exercise of legitimate and traditional state interests. *Id.*

Contrary to the Ninth Circuit's finding in *von Saher*, § 354.3 does not "create[ ] a new cause of action," whether aimed at wartime wrongs or anything else. *See von Saher v. Norton Simon Museum of Art*, 592 F.3d 954, 966 (9th Cir. 2010). Instead, it simply extends the statute of limitations in certain property conversion cases, which is well within California's right to do.

Because the determination of an applicable statute of limitations presents a legitimate state interest, and falls within an area of traditional state competence, the Ninth Circuit never should have reached a field preemption analysis. *See Am. Ins. Assoc. v. Garamendi*, 539 U.S. 396, 420 n. 11 (2003) ("If a state were simply to take a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility, field preemption might be the appropriate doctrine..."); *see also von Saher*, 592 F.3d at 970-71 (Pregerson, J., dissenting).

Furthermore, since states traditionally have been responsible for establishing statutes of limitations for conversion of property, the Ninth Circuit's decision would leave victims of Holocaust art theft without any legislative relief from the unique circumstances which California has determined warrant extension of the standard statute of

limitations. Likewise, this decision will discourage other states from passing similar legislation aimed at assisting victims of Nazi looting.

II. The *von Saher* Ruling Will Have A Devastating Impact On Thousands Of Individuals

The United States is home to the third-largest Holocaust survivor population in the world. Keren Blankfeld Schultz, *For Many Holocaust Survivors, a Final Struggle*, COLUMBIA NEWS SERVICE, Oct. 30, 2007, *available at* http://jscms.jrn.columbia.edu/cns/2007-10-30/schultz-perpetualsurvivors.html. Thousands of these individuals have fought to locate and recover property stolen from themselves or their predecessors, or that they or their predecessors were forced to sell, as a result of the illegal and corrupt Nazi regime.

These claimants, through no fault of their own, are in a unique situation warranting an extension of the typical or standard statute of limitations applied in conversion cases. As an initial note, the owners of the art in question were, if they were "lucky," able to "voluntarily" flee their homes and businesses, often leaving valuables and records, if any, behind. If they were unlucky, they were physically evicted and rounded up by Nazi officials, and likewise forced to leave their possessions and papers behind. Similarly, records tracking the theft or subsequent

forced sale of the artwork at issue are frequently lost or nonexistent.

Another hurdle for pursuing these claims is the difficulty in finding witnesses. Some relevant witnesses may be living in foreign countries, if they even are able to be located. Others may have passed away. Many Holocaust survivors tried to ignore their terrible past and go on with their lives without looking back, only sharing stories and information with family later in life.

Locating looted art does not follow the typical sequence or timeline of most stolen property cases. It is time-consuming and expensive. A substantial amount of research is involved, and much of it must be conducted abroad. Many documents that claimants are able to locate need to be translated, which itself is a protracted process. Additionally, claimants often find they need to consult historical, art, and legal experts to conduct and analyze this research. This, too, adds to the expense and length of the search.

Moreover, for many years following the end of World War II, other historical events prevented searches and recovery of Nazi-looted artwork. The world was in the midst of the Cold War from World War II's conclusion until 1989, and generally "it was not until the collapse of communism that a serious effort commenced to identify artworks that still had not been returned to their rightful

owners." *See* J. Christian Kennedy, Special Envoy for Holocaust Issues, *The Role of the United States in Art Restitution*, Remarks at the Conference in Potsdam, Germany (Apr. 23, 2007), http://germany.usembassy.gov/kennedy_speech.html. Thereafter, archives that had been secret became publicly available for research.

Following the 1998 Washington Conference on Holocaust Era Assets, however, governments, along with private organizations and individuals, began to acknowledge that prior restitution efforts had been inadequate. CAR has been instrumental in lobbying for legislative and policy changes to reflect this shift in perspective.

Applying a typical statute of limitations to restitution claims for Nazi-looted art fails to recognize that these thefts and forced sales were undertaken by one of the most profoundly unlawful regimes the world has ever known. Rather, it prevents justice for the victims of said regime by allowing for the use of technical defenses against Holocaust victims and their heirs. Many of these claimants do not stand a chance of recovering their property if they are required to face a standard statute of limitations. Not only does a typical statute of limitations likely deny them such recovery, it also denies them the right to have their claim heard and resolved on the merits.

III. The Policy of the Federal Government Is That Holocaust Restitution Claims Should Be Resolved On The Merits, and § 354.3 Is Consistent With That Policy

The clearly articulated position of the United States Federal government is that looted Nazi-era property should be returned to its rightful pre-War owners, and that the use of technical defenses to combat the resolution of claims for restitution of this property should be discouraged. *See* Kennedy, *The Role of the United States in Art Restitution*. Rather, these claims should be resolved on the merits. As expressed by Ambassador Stuart Eizenstat, who represented the U.S. as the head of the U.S. delegation for the Prague Holocaust Era Assets Conference in June 2009:

> I am also concerned by the tendency of holders of disputed art to seek refuge in statutes of limitations and laches defenses in order to block otherwise meritorious claims even in situations where the claimant has not been provided with provenance information. Given the nature of the Holocaust and the Cold War that followed, many families simply were unaware or only partially aware of their heritage. The difficulty in getting documentation and the uncertain nature

> of the current restitution process creates further uncertainty. For a defendant to take advantage of circumstances totally beyond the control of the claimant compounds the grotesque nature of the original crime.

Eizenstat, *Opening Plenary Session Remarks at Prague Holocaust Era Assets Conference.*

Most of the art claims brought in the U.S. involve a claimant on one side and a private museum, gallery, institution or individual collector on the other, and thus "the role of U.S. government has been limited..." Kennedy, *The Role of the United States in Art Restitution.* Furthermore, "[w]hile the government can urge institutions to participate voluntarily in programs such as the one sponsored by the Museum Association, the government does not have any leverage to force compliance..." *Id.* Because claims are almost exclusively brought against private organizations and individuals, "[t]his leaves no specific role for the federal government in the art restitution process. *Id.*

While the Federal government encourages a policy of meritorious claim resolution and the return of art to pre-War owners, it has not sought, or indicated an intention to seek, specific federal legislation to support that goal. Individual States may act within their traditional competence to pass legislation to discourage the use of statutes of

limitations defenses to prevent the adjudication of Nazi-looted art claims on the merits. Extending statutes of limitations for property conversion, which is a long-standing area of State responsibility, is one possible solution. Thus, § 354.3 both supports explicit Federal policy addressing the issue of Holocaust-era art, and is a permissible and constitutional vehicle for California to achieve its goal of promoting meritorious resolution of Holocaust-related art restitution claims. *See von Saher*, 592 F.3d at 970-71 (Pregerson, J., dissenting).

CAR is prepared to lead a nationwide campaign for changes to statutes of limitations law aimed at accommodating this preference, expressed both by the U.S. government and the worldwide community of nations, but these changes must be made at the state level. To do this, CAR needs to seek state legislation that discourages the use of statutes of limitations as a defense in cases seeking restitution of Holocaust-era property. However, that mission will be impossible if the *von Saher* decision, which renders such legislation unconstitutional, is left to stand by the Supreme Court. Guidance from the Supreme Court on this issue is therefore critical.

IV. Technical Defenses Like Statutes of Limitations Should Not Be Used To Prevent Recovery Of Nazi-Looted Art

CAR has worked with governments worldwide to ensure that the recovery process is streamlined, and that Holocaust-related art restitution claims are decided on the merits, rather than on technical legal defenses, such as statutes of limitations or laches arguments. *See* Commission for Art Recovery, Mission Statement, http://www.commartrecovery.org/mission.php. There is a wide consensus among international governments and institutions acknowledging that claimants requesting return of Nazi-looted art should receive just resolutions. Indeed, the U.S. has made clear over the last decade that it, too, espouses this policy.

The U.S. State Department, in conjunction with the United States Holocaust Memorial Museum, convened the 1998 Washington Conference on Holocaust Era Assets, where the 44 participating nations, including the U.S., agreed upon and adopted the Washington Conference Principles on Nazi-Confiscated Art. These non-binding Principles dictate that "steps should be taken expeditiously to achieve a just and fair solution" when pre-War owners of Nazi-looted art can be identified. *Washington Conference Principles on*

Nazi-Confiscated Art (Dec. 3, 1998), http://www.state.gov/p/eur/rt/hlcst/122038.htm.

The Washington Conference served to shed a much-needed spotlight on the issue of Holocaust-era art, so much so that "[i]mmediately following the conference, we saw more positive action by nations on this issue in the last six months than at any time since 1950." J.D. Bindenagel, *Washington Principles on Nazi-confiscated Art: Ten Years and Promises of the Washington Principles*, Holocaust Era Assets Conference Prague and Terezin, Czech Republic (June 26-30, 2009), http://www.commartrecovery.org/docs/bindenagel.pdf.

More recently, the U.S. has signed on to the Terezin Declaration on Holocaust Era Assets and Related Issues, which was adopted at the 2009 Prague Conference and endorsed by 46 nations. As an initial matter, the Terezin Declaration:

> Recogniz[es] that art and cultural property of victims of the Holocaust (Shoah) and other victims of Nazi persecution was confiscated, sequestered and spoliated, by the Nazis, the Fascists, and their collaborators through various means including theft, coercion and confiscation, and on grounds of relinquishment as well as forced sales and sales under duress, during the

> Holocaust era between 1933-45 and as an immediate consequence,...

Terezin Declaration on Holocaust Era Assets and Related Issues (June 30, 2009), http://www.state.gov/p/eur/rls/or/126162.htm.

Drawing on the support of, commitment to, and experience gained since, the Washington Conference Principles on Nazi-Confiscated Art, the Terezin Declaration pointedly:

> [U]rge[s] all stakeholders to ensure that their legal systems or alternative processes, while taking into account the different legal traditions, facilitate just and fair solutions with regard to Nazi-confiscated and looted art, and to make certain that claims to recover such art are resolved expeditiously and based on the facts and merits of the claims and all the relevant documents submitted by all parties.

Id.

Through the Terezin Declaration, the U.S. government thus reiterated the central tenet of its commitment to resolve Holocaust-era art claims in an expeditious and just manner: to wit, addressing only the merits of such claims.

The AAMD and the AAM also provide their members with non-binding ethical guidelines relating to Nazi-era objects. *Report of the AAMD Task Force on the Spoliation of Art during the Nazi/World War II Era (1933 – 1945)* (June 4, 1998, Amended Apr. 30, 2001), http://www.amd.org/papers/guideln.php; *Guidelines Concerning the Unlawful Appropriation of Objects During the Nazi Era* (Approved Nov. 1999, Amended April 2001), http://www.aam.us.org/museumresources/ethics/nazi-guidelines.cfm. The AAM's guidelines specifically acknowledge that museums "may choose" to forego technical defenses when faced with Holocaust restitution claims. *Id.*

Many museums, however, do not choose to forego these defenses, and CAR is concerned that museums are not acting properly to ensure that Nazi-looted art is returned to rightful owners. As Ambassador Eizenstat has noted:

> Some holders of artworks have not honored the [Washington] Principles and have gone to great lengths to retain objects in the face of facially valid claims. In the United States, declaratory judgments are being used to make it more difficult for claimants to prove their ownership. Other holders of art have simply refused to consider claims, thereby forcing the claimants either to give up

their claims or engage in expensive and difficult legal proceedings.

Eizenstat, *Opening Plenary Session Remarks at Prague Holocaust Era Assets Conference*.

Ambassador Bindenagel has expressed similar distress over the treatment of Holocaust-related claims by U.S. museums and Courts. *See* Bindenagel, *Washington Principles on Nazi-confiscated Art: Ten Years and Promises of the Washington Principles*.

The AAM has not been completely ineffectual. To help promote its guidelines, the AAM has taken the positive step of setting up a portal linking websites of major U.S. museums that have posted the provenance of their possessions known to have changed hands between 1933 and 1945 in Europe. *See* Nazi-Era Provenance Internet Portal at www.nepip.org ("NEPIP"). However, this system is imperfect. *See* Kennedy, *The Role of the United States in Art Restitution*. Not all museums are members of the AAM or participate in the NEPIP. A particularly notable exception is the Norton Simon Museum. *See* American Association of Museums, List of Accredited Museums, http://www.aam.us.org/museumresources/accred/list.cfm; *see also* NEPIP Participating Museums, http://www.nepip.org/public /search /museum.cfm?action=mussearch&menu_type=search. A recognized gap in the NEPIP system is that many smaller museums

have not submitted provenance data for their collections, claiming the research cost is too high. Kennedy, *The Role of the United States in Art Restitution*. The U.S. government "strongly supports" efforts by the AAM "to close that gap." *Id.*

As of April 2007, the portal contained 25,424 objects from 155 museums. Kennedy, *The Role of the United States in Art Restitution*. The portal currently includes 28,141 pieces of art owned by 168 U.S. museums. See "Project Status" section on NEPIP Home Page, http://www.nepip.org. Approximately 9,500 have been added since July 2006. *See* Kennedy, *The Role of the United States in Art Restitution* (approximately 7000 works were added between July 2006 and April 2007); *see also* NEPIP Home Page, www.nepip.org (28,141 works currently listed in portal).

Clearly, research into these works is ongoing, and many claimants might not learn the location of a particular artwork until it is posted on the portal. Unfortunately, just because a particular piece has not been posted on the portal until recently does not insulate a claimant from a statute of limitations defense, or from losing in the courtroom on the basis of that defense. For example, the Detroit Institute of Arts and the Toledo Museum of Art both maintained statutes of limitations defenses against individuals seeking the return of Nazi-era artwork, even though those claimants

only gained actual awareness that the museums possessed the art in question after finding the works listed on a website. *See Detroit Institute of Arts v. Ullin*, No. 06-10333, Memorandum Opinion and Order of Hon. Denise Page Hood, Dkt. 36, slip op. at 4-6 (E.D. Mich. S. Div. Mar. 31, 2007) and *Toledo Museum of Art v. Ullin*, 477 F. Supp.2d 802, 805-08 (N.D. Ohio 2006).

In both of these cases the museums argued, and the respective courts held, that the claims of ownership were barred by the applicable statute of limitations because the claimants or their predecessors reasonably should have discovered the whereabouts of the paintings at issue well before the museums posted information about the works. *See Detroit Institute of Arts*, slip op. at 6 (finding that claim to painting accrued in 1938, and that even if discovery rule were applied, claim would have accrued in 1973 because claimant's predecessors "'through the exercise of reasonable diligence should have discovered' that they had a possible cause of action to recover the Painting."); *Toledo Museum of Art*, 477 F. Supp.2d at 808 ("no matter what date is selected [for the running of the statute of limitations]...Defendants' claims are time barred well before their filing in 2006.").

AAM has been made aware of problems with the repeated use by U.S. museums of technical defenses to Holocaust-related restitution claims, and the concerns that such behavior has raised.

For example, on October 20, 2009, Wesley A. Fisher, the Director of Research for the Conference on Jewish Material Claims Against Germany, Inc. wrote to AAM President Ford W. Bell, requesting the AAM to revise its Guidelines to reflect the principles articulated in the newly-adopted Terezin Declaration. *See* Letter from Wesley A. Fisher, Director of Research, Conference on Jewish Material Claims Against Germany, Inc., to Ford W. Bell, President, AAM (Oct. 20, 2009), Appendix A, attached. Mr. Fisher pointed out that the AAM's stance is that relying on technical legal defenses, such as statutes of limitations, is appropriate, and even a museum's "obligation," when presented with "non-meritorious" claims. *Id.* at 2. Unsurprisingly, Mr. Fisher further explained that he was:

> [G]reatly troubled by the idea that museums should assign to themselves the role of determining whether a particular claim has merit, instead of submitting that determination to a court of law or other neutral arbiter. This strikes at the very heart of the principles adopted by the forty-six nations in Prague, not to mention our system of justice, as well as the AAM's stated desire to have claims determined on the merits. In no case should the museums – or for that matter, the claimants – appropriate to themselves the power to determine the merits of a case. Moreover, we do not see how a museum could ever be obligated to

> keep in its collection a work that bears the taint of Holocaust-related events based solely on technical defenses that do not go to the factual merits of a claim.

Id.

The Detroit Institute of Arts and Toledo Museum of Art are not the only U.S. museums in recent memory that have stopped good-faith negotiations to instead bring declaratory judgment actions to quiet title to works in their collections.

In *Schoeps v. Museum of Modern Art*, the Museum of Modern Art and the Solomon R. Guggenheim Foundation filed a declaratory judgment action to quiet title as to two Picasso paintings being claimed by the heirs of Paul von Mendelssohn-Bartholdy, a German of Jewish descent. *Schoeps v. Museum of Modern Art*, 594 F. Supp.2d 461, 463 (S.D.N.Y. 2009). Before the court was able to reposition the parties "to more accurately reflect" their positions, the Museums had moved for summary judgment based on laches, choice of law questions, and a technical argument that the claimants were not permitted to bring conversion and replevin claims "without first having been appointed as representatives of the relevant estate by the New York Surrogate," despite the fact that their own witness testified that the concept of an "estate" does not exist under German law – which the Museums otherwise had argued governed the relevant causes

of action. *Id.* at 463, 465-68. Fortunately for the *Schoeps* claimants, the Museums' motion for summary judgment was denied, *id.* at 468, and the parties entered into a confidential settlement on the eve of trial. *See* Lindsay Pollock and Philip Boroff, *Judge Slams MoMA, Guggenheim on Secret Holocaust Art Agreement*, June 18, 2009, *available at* http://www.bloomberg.com/apps/news?pid=20601088&sid=ayZK6G30lMfU.

By contrast, the claimant in *The Museum of Fine Arts, Boston v. Seger-Thomschitz* did not fare so well. In that case, the Museum moved for a declaratory judgment seeking to quiet title to a painting by Oskar Kokoschka, and moved for summary judgment, arguing that Dr. Seger-Thomschitz's claims were time-barred. *The Museum of Fine Arts, Boston v. Seger-Thomschitz*, Civ. Action No. 08-10097-RWZ, Memorandum of Decision and Order of Hon. Rya W. Zobel, Dkt. 59, slip op. at 1-2 (D. Mass. May 28, 2009).

Such assertions by museums do not harmonize with the stated Principles in the Terezin Declaration, and with the U.S. government's explicit position that Holocaust-era restitution claims should be resolved on their merits. Claimants deserve at least a day in court to have their allegations decided on the facts, whether or not the outcome is in their favor.

CONCLUSION

California's § 354.3, and the policy behind it, is supportive of the Federal position that Holocaust restitution claims should be resolved on their merits. This statute does not encroach on the Federal government's foreign affairs or war powers, and both the absence of a conflicting federal policy and the existence of a legitimate state interest in an area traditionally regulated by the states, meaningfully differentiate it from the provision reviewed and found unconstitutional by the Court in *Garamendi*. The Ninth Circuit's decision instead resounds in inconsistency when finding that a claim for Holocaust-era assets may be pursued within California's existing, traditional, statute of limitations without infringing on federal war powers, yet becomes an imposition on those war powers when that same claim is permitted to be pursued under an extended statute of limitations.

States should be encouraged to pass legislation limiting the use of technical defenses against Holocaust claims, consistent with the Federal policy of meritorious resolution of such claims. While such legislation will enable Holocaust claimants to get into court without facing technical defenses, it will not mean an automatic victory for every plaintiff. Indeed, there may well be many instances where plaintiffs will lose their cases even without the bar of statutes of limitations or other technical defenses commonly used. This does not

mean, however, that those claimants should be deprived of the right to have their claims heard and resolved on the merits.

An opportunity for recovery through California's determination of which statute of limitations to apply to property conversion cases presented in its courts has nothing to do with federal power over foreign policy – and everything to do with recognition of reality.

For all of the foregoing reasons, Petitioner Marei von Saher's petition for writ of *certiorari* should be granted.

Respectfully Submitted,

MICHAEL A. LACHER
Counsel of Record
Lacher & Lovell-Taylor
460 Park Avenue
New York, NY 10022
(212) 872-1500
mlacher@lltlaw.com

Attorneys for Amicus

CONFERENCE ON JEWISH MATERIAL CLAIMS AGAINST GERMANY, INC. תעידת התביעות
1359 Broadway • Room 2020 • New York, NY 10018 • Tel. (212) 696-4944 • Fax (212) 679-2126 • Email: info@claimscon.org

October 20, 2009

Mr. Ford W. Bell, DVM
President
American Association of Museums
1575 Eye Street, NW, Suite 400
Washington, DC 2005
fbell@aam-us.org

Dear Mr. Bell,

I write to you after consultation with the Commission on Art Recovery and a broad range of experts in the field of art law, as well as after the State Department Town Hall Meeting to Review the Implementation of the Terezin Declaration Provisions Relating to the Restitution of Nazi-Confiscated Art held on September 22, 2009.

At the Holocaust Era Assets Conference held June 26-30, 2009 in Prague and hosted by the Czech Republic as part of its Presidency of the European Union, the forty-six countries in attendance – including the United States – reviewed the progress made since the 1998 Washington Conference on Holocaust-Era Assets and the adoption at that time of the Washington Conference Principles on Nazi-Confiscated Art. They then approved the Terezin Declaration, a copy of which is attached. The text of the Declaration may also be found on the website of the Prague Conference at http://www.holocaustera.assets.eu

We have previously brought to the AAM's attention problems with the use by American museums of technical defenses, such as the statute of limitations and the doctrine of laches, when faced with Holocaust-related claims (attached for your convenience are copies of our letter to you dated May 21, 2008 and of your response dated June 19, 2008). We would like to return to the subject in view of the Terezin Declaration.

In the section of the Declaration entitled "Nazi Confiscated and Looted Art," the forty-six states reaffirm support of the Washington Conference Principles on Nazi-Confiscated Art and "encourage all parties including public and private institutions and individuals to apply them as well." We particularly call your attention to point 3 of the section, which focuses on the need for claims to be decided on the merits, as opposed to other bases: "Keeping in mind the Washington Conference Principles on Looted Art, and considering the experience acquired since the Washington Conference, we urge all stakeholders to ensure that their legal systems or alternative processes, while taking into account the different legal traditions, facilitate just and fair solutions with regard to Nazi-confiscated and looted art, and to make certain that claims to recover such art are resolved

expeditiously and based on the merits and facts of the claims and all the relevant documents submitted by all parties."

In his keynote address at the Prague Conference, Ambassador Stuart Eizenstat made pointed reference to the use of technical defenses to avoid a resolution of looted art claims "on the merits": "I am . . . concerned by the tendency for holders of disputed art to seek refuge in technical defenses to avoid potentially meritorious claims, including statutes of limitation . . . ."

In your letter of June 19, 2008, you took the position that invoking such legal defenses was appropriate – indeed, a museum's "obligation" as you put it -- when faced with a "non-meritorious claim." Representing the AAM at the recent State Department Town Hall Meeting, Erik Ledbetter repeated this position and stated that most claims against U.S. museums have been settled by the museums and that technical legal defenses have been used only where U.S. museums have concluded that the claims are without merit.

We are greatly troubled by the idea that museums should assign to themselves the role of determining whether a particular claim has merit, instead of submitting that determination to a court of law or other neutral arbiter. This strikes at the very heart of the principles adopted by the forty-six nations in Prague, not to mention our system of justice, as well as the AAM's stated desire to have claims determined on the merits. In no case should the museums -- or for that matter, the claimants -- appropriate to themselves the power to determine the merits of a case. Moreover, we do not see how a museum could ever be obligated to keep in its collection a work that bears the taint of Holocaust-related events based solely on technical defenses that do not go to the factual merits of a claim.

As we noted at the State Department Town Hall Meeting, we are greatly appreciative of the efforts of the AAM and of American museums to deal with the question of Nazi-confiscated art. However, even settlements between museums and claimants do not always represent a resolution based on the facts and the merits of a case, let alone court decisions reached based on technical legal defenses.

The consensus at the State Department meeting was to move in the direction of establishing ways in which fact-finding and research in each case could initially be submitted to some form of neutral commission so as to avoid time-consuming and expensive litigation, especially in those cases where either side believes that its position is clearly correct and can be easily established.

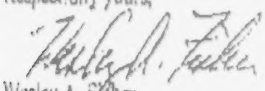
Whether or not such a commission is eventually established, we request that the AAM change its "Guidelines Concerning the Unlawful Appropriation of Objects During the Nazi Era" to reflect the principles adopted in Prague. Specifically, we suggest that point 4f of the Guidelines be changed. At present that point reads as follows: "AAM acknowledges that in order to achieve an equitable and appropriate resolution of claims, museums may elect to waive certain available defenses." We suggest that this language be changed to read something like the following: "In order to achieve an equitable and appropriate resolution of claims, museums should waive available technical defenses

including defenses concerning the passage of time such as statutes of limitations and the doctrine of laches, and doctrines of good faith acquisition and adverse possession based on foreign laws of prescription or otherwise."

Thank you for your attention to this matter.

With best personal regards,

Respectfully yours,



Wesley A. Fisher
Director of Research

Cc:
Mr. Carl R. Nold, Chair of the Board, AAM
[illegible]

Dr. James A. Welu, Chair Accreditation Commission, AAM
[illegible]

Mr. Erik Ledbetter, Director of International Programs, AAM
[illegible]

Mr. Charles A. Goldstein, Counsel, Commission for Art Recovery
[illegible]